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Chairman: Mr. Baja ..... (Philippines)

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Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (*continued*)

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03-58246 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (*continued*) (A/58/10)

1. **Ms. Swords** (Canada), referring to the topic of the responsibility of international organizations, observed that in 2004 the International Law Commission would address questions relating to the attribution of conduct. Certain parallel issues relating to attribution of conduct to States were dealt with in articles 4 to 11 of the draft articles on responsibility of States for internationally wrongful acts. The Commission had requested the views of Governments on three specific questions. The first was whether a general rule on attribution of conduct to international organizations should include a reference to the "rules of the organization". Draft article 4, in addressing the acts of "State organs", referred to the internal law of the State in question. Following the same logic, it might well be necessary to include a reference to the "rules of the organization" in the case of organs or other equivalent entities of an international organization.

2. With regard to the second question, Canada regarded as adequate the definition of "rules of the organization" contained in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. According to that paragraph, "rules of the organization" meant "in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization". However, it should be made clear that if the Commission followed the framework of the draft articles on responsibility of States for internationally wrongful acts and referred to the organs of an organization and the rules by which they were established, it would also have to address issues relating to the attribution of responsibility for action not contemplated in those rules. The Commission would have to address issues relating to acts undertaken on behalf of international organizations by persons or actors other than organs and acts performed in excess of authority.

3. Concerning the extent to which the conduct of peacekeeping forces was attributable to the contributing State and the extent to which it was attributable to the United Nations, Canada considered that that would depend on the circumstances of the case and the arrangements made between the United Nations and the contributing State. The United Nations might consider the personnel provided by Member States to be experts performing missions for the United Nations as defined in the 1946 Convention on the Privileges and Immunities of the United Nations. In that case, it would appear logical to attribute responsibility for their actions to the United Nations. However, in other cases it might be clear that national contingents were acting on behalf of the sending State. A key issue to be considered in that regard was the extent to which the United Nations controlled the conduct of the individuals in question, particularly since the context was different from that envisaged in article 8 of the draft articles on responsibility of States for internationally wrongful acts.

4. **Mr. Mezeme Mba** (Gabon), replying to the Commission's questions concerning the issue of attribution of conduct and, more specifically, whether it was possible to refer to the "rules of the organization" by analogy with the concept of internal law referred to in the draft articles on State responsibility, said that his country would consider it appropriate to establish a parallel between the internal law of States and the "internal law" of international organizations. The former consisted of the legislation and regulations constituting the legal order of States and similarly, the internal law of international organizations consisted of the texts establishing the rules governing their organization and functioning. However, the definition of "rules of the organization" contained in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was not satisfactory, since in matters involving responsibility it was desirable to have the widest possible sphere of application. The term "constituent instrument" used in the Vienna Convention was limitative and might lead to confusion, since it was only one of the forms that the treaty establishing an international organization could take. It would be preferable to use a more general formula that specifically mentioned the operating rules of the organization.

5. With regard to the extent to which the conduct of peacekeeping forces was attributable to the United Nations, that situation was comparable to the one provided for in article 8 of the draft articles on State

responsibility concerning the attribution to a State of the conduct of organs placed at its disposal by another State. However, that solution would appear to be unsatisfactory, since a clear distinction must be drawn between the conduct engaged in by peacekeeping personnel in connection with their mission, on the one hand, and in their private lives, on the other. In the first case, the United Nations could incur responsibility whereas in the second the responsibility would lie with the contributing State, although the latter could bring an action against the author of the harmful conduct. However, the latter question fell within the sphere of internal law. In that connection, the Commission could also draw upon the responsibility regime established in the agreements between the United Nations and contributing States.

6. The draft articles on responsibility of international organizations, which were based on the earlier work on State responsibility, covered only responsibility for acts that were wrongful under international law and did not require the existence of any damage. He wondered whether the Commission was envisaging the possibility of carrying out a study on the liability of international organizations for acts not prohibited under international law. With regard to draft article 1, he was pleased that paragraph 2 enlarged the scope of the State responsibility regime to include responsibility deriving from acts attributable to an international organization, since that would help to fill gaps in the draft articles on State responsibility. With regard to draft article 2, the definition of an international organization was debatable, since it was based on three criteria: the organization had to be established by a treaty or other international instrument, it had to possess its own international legal personality and its members had to be States or other entities. In principle, it was the treaty establishing an international organization that endowed it with international legal personality and empowered it to perform acts distinct from those of its component entities. Furthermore, it would be difficult to establish formal rules regulating recognition of the international legal personality of a specific organization. Consequently, the reference to the criterion of international legal personality was superfluous and could unnecessarily complicate the definition of the rules governing the responsibility of international organizations. Lastly, the term "entities" was vague and imprecise and should be defined in an unambiguous manner. Draft article 3 met with the full approval of his delegation.

7. Concerning chapter XI of the report, Gabon was opposed to limiting in advance and *in abstracto* the length of reports of Special Rapporteurs and of the Commission itself. With regard to the relations between the Commission and the Sixth Committee, their satisfactory quality was clear from chapters II and III of the report, dealing respectively with the work of the Commission at its fifty-fifth session and the issues on which the comments of Governments would be of particular interest. In that connection, he emphasized the need for delegations to provide the Commission with the fullest and clearest possible information on the issues raised.

8. **Mr. Wood** (United Kingdom) said he fully supported the statement made the previous day on behalf of the European Union on the topic of responsibility of international organizations. It was very important that the Commission should take full account of the practice and concerns of all types of international organization; the European institutions had much to offer in that regard. The draft articles on State responsibility, which paralleled those on which the Commission was currently working, had occupied the latter for decades, even though they referred to the State, a clear and uniform concept in international law, and despite the existence of many studies on the topic. The current topic, on the other hand, related to a category of international persons — international organizations — which were infinitely varied in their functions and powers, in their status, rights and obligations, and in their relationships with members and others. Moreover, it was an area where practice, case law and specialized studies were relatively sparse. Given that background, the Commission should first gather and study such materials as existed across the whole field to be found in the legal branches of the secretariats of the United Nations, the specialized agencies, the international financial institutions and other global and regional institutions, including, for example, the European Community, as well as material available from States and academic circles. Once that had been done, it would be possible to identify the areas ripe for codification or for further study. More thought should be given to the topic, and in that connection it would be helpful to review all sections of the articles on State responsibility and see the magnitude of the issues arising in the current context,

rather than simply reproducing the corresponding articles with the usual word changes.

9. The Commission had asked States three specific questions relating to the attribution of conduct, which were not easy to answer. Assuming that the concept of an "organ of an international organization" was central, he wondered how such an organ would be defined and whether the definition would include any person or entity having the status of organ in accordance with the "rules of the organization". There were obvious differences between the internal law of the State and the rules of an organization, since the organization might not, for example, have any body empowered to change or interpret the rules. The question also arose as to who should decide whether an entity was an organ for the purposes of the articles should a difference of opinion arise in that connection. As to the third question, the term "peacekeeping forces" covered different types of force operating in different relationships with very different organizations which might have widely differing mandates, powers and structures. Furthermore, there was often a specific agreement between the organization and the contributing State setting out the basic relationships of the parties.

10. Lastly, with regard to the three draft articles adopted thus far, article 1 made it clear that the Commission intended to cover not only the responsibility of international organizations but also the responsibility of States for the conduct of such organizations. That was clearly an important issue that had been left pending during the work on the topic of State responsibility. However, given the differences between the two issues, it was doubtful whether it could be studied in the current context. With regard to article 2, he was not convinced of the utility of departing from the very simple definition of "international organization" contained in previous codification exercises. Lastly, article 3 was straightforward and uncontentious but should not lead to the conclusion that the articles on State responsibility could easily be adapted to a very different field such as the responsibility of international organizations.

11. **Ms. Telalian** (Greece) observed that the topic of responsibility of international organizations was a sequel to the draft articles on responsibility of States for internationally wrongful acts and the rules governing responsibility of States might apply, with the necessary modifications, to international organizations. Concerning the draft articles dealing with the scope and general principles of the topic, the Commission was proposing a new definition of "international organizations" which was based neither on the existence of a treaty-based constituent instrument nor on the intergovernmental character of the organization and reflected current reality in that international organizations were also established by instruments which were legally or politically binding and had a mixed membership including both States and non-State entities. The other important element of the definition was the legal personality of the international organization, which should be distinct from that of its member States. That factor was reflected in the wording "possessing its own international legal personality" used in article 2. She noted with satisfaction that the Special Rapporteur had not only elaborated on the separate legal personality of international organizations but had also addressed many other questions, such as whether the organization was to be regarded as having acted as the agent of its members. If so, its conduct should be attributed to the State or States concerned according to draft articles 4 and 5 on the responsibility of States for internationally wrongful acts. The remarks made by the Special Rapporteur concerning the functions of international organizations were very pertinent and she shared the Commission's view that it should deal only with responsibility under international law.

12. With regard to the draft articles on attribution of conduct, she was in general agreement with the content of article 3, which was based on articles 1 and 2 of the draft on State responsibility and applied the two criteria of breach of an international obligation and attribution of the wrongful act to the State to the determination of an international organization's responsibility. A general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization". Illegal acts of international organizations were null and void and without legal effect and the organization should be considered liable for any damage caused. The definition of the "rules of the organization" in the Vienna Convention was adequate for the purposes of the draft articles, since the established practice of the organizations was an important factor in determining attribution.

13. The question of the extent to which the conduct of peacekeeping forces was attributable to the contributing State or to the United Nations was closely linked to the question of the responsibility of a State for a wrongful act of an international organization, and the Commission was not opposed to formulating a principle on that issue. To the extent that peacekeeping forces were under the authority and command of the United Nations, breaches of international obligations by the members of those forces had been attributed to the Organization rather than to Member States. However, given the great diversity of peacekeeping missions the Commission should bear in mind the possibility of attributing conduct to States Members of the Organization in the case of concurrent or subsidiary liability.

14. **Mr. Mathias** (United States of America) thanked Austria and Sweden for their initiative aimed at revitalizing the debate on the Commission's work.

15. The issue of responsibility of international organizations was a complex one, in part because of the diversity of such organizations, which was not simply functional but also structural and conceptual, making it difficult to define an "international organization" for the purposes of the topic. The United States intended to comment on that definition in writing.

16. With regard to the attribution of conduct, the Commission should focus initially on determining the manner in which that issue had been addressed by States, international organizations and judicial and arbitral tribunals. In the specific case of peacekeeping forces, it would be very useful to assess the full range of practice in that area before preparing draft articles. Lastly, the Commission should not confine itself to developing rules for international organizations analogous to those applicable to States.

17. **Mr. Troncoso** (Chile) recalled that at the fifty-seventh session of the General Assembly his delegation had said that the Commission should take the draft articles on State responsibility as a guide when considering the responsibility of international organizations. Article 1 defined the scope of the draft articles, i.e., their application, mainly in the case of acts that were wrongful under international law, but no mention was made of wrongful acts of the organization itself. It should be emphasized that the attribution to States of responsibility for wrongful acts of the organization should be an exception, since the organization should be responsible for its own acts. He therefore proposed that the draft articles should state that their text would apply to States "when appropriate" and indicate specifically in which cases such responsibility would be attributed. He agreed with the text of article 2 as submitted by the Commission, which defined an "international organization" on the basis of the traditional elements used for such entities. However, there was no indication why the words "exercises in its own capacity certain governmental functions", proposed by the Special Rapporteur, had been omitted.

18. With regard to article 3, on general principles, the reference to internal law had been omitted because the Commission considered that the characterization of a wrongful act was not affected by its characterization under the internal law of the organization; it was difficult to transfer that principle to international organizations. He doubted whether the omission was pertinent, for although some instruments of the organization constituted international law, many of its internal rules, for example its operating rules, did not.

19. **Mr. Baker** (Israel), referring to responsibility of international organizations, said that guidance might be sought from the work of the Committee of the International Law Association. In draft article 1, paragraph 2, it should be made clear that a State would incur responsibility for an internationally wrongful act of an organization only to the extent that the State acted as a member or organ of the international organization. The term "instrument" required further reflection, since it seemed too broad and vague as a criterion for determining the existence of an international organization. Moreover, the reference in article 2 to "entities" as members of international organizations seemed overly simplistic. According to current practice, an entity could only be a member of an international organization when the constituent instrument of that organization stated very clearly that it could become a member. The statement that there was a "significant trend in practice" towards entities becoming additional members of international organizations seemed too broad and should be further substantiated and evaluated. The Commission's work should focus on intergovernmental organizations and it would therefore be preferable to delete the second sentence of draft article 2.

20. With regard to the rule on attribution, it would be very useful to refer to the "rules of the organization",

which set out the personality of the organization, its mandate and its powers. The rules of international organizations were, of course, not identical, and that reference would help to differentiate between the powers and responsibilities of the many and various organizations in existence. Furthermore, the international personality of an international organization was determined both by its constitution and by its practice, and that should be reflected in the relevant draft article. With regard to the Commission's second question, the definition of the "rules of the organization" set out in the Vienna Convention seemed especially suitable, since it permitted a proper differentiation of the international responsibilities of each organization.

21. With regard to the third question, he agreed with the delegations which had questioned the desirability of addressing the issue of peacekeeping forces at the current stage. Peacekeeping missions could vary greatly and it would be advisable not to become mired in complex concrete cases before elaborating general criteria. Responsibility for the acts or omissions of a United Nations peacekeeping force would prima facie be incurred by the Organization itself, at least when it had effective control over the force. Where the force acted within the "rules of the organization", the logical conclusion would be that the legal responsibility fell to the United Nations, since in most cases the presence of the force and its access to the territory of a State were a consequence of the consent given to the Organization by the territorial State. However, a variety of factors might need to be considered in any given case, including the rules of the organization, its practice, the question of effective control and the existence of a relationship agreement. There might well be cases where the United Nations and contributing States could not have joint or concurrent responsibility; that would depend largely on the relationship between those States and the Organization and on the effective control exercised in any given situation. The general goal was to elaborate rules guaranteeing that the wrongdoing party, whether an international organization or a State, could be held to account in such circumstances.

22. **Mr. Curia** (Argentina) said that his country fully supported the proposal of Austria and Sweden aimed at revitalizing the debate on the Commission's report. His delegation also wished to join those which had emphasized the importance of making the report available at the appropriate time.

23. The questions raised by the Commission were somewhat general and could be made more precise or specific.

24. With regard to the attribution to an international organization of conduct entailing responsibility, Argentina considered that prima facie it would not be advisable to refer to the definition of the "rules of the organization" contained in the Vienna Convention. A State could not invoke a rule of its internal law to justify its failure to comply with an international obligation, and similarly, an international organization could not invoke one of its internal operating rules to justify an act entailing responsibility.

25. **Mr. Tavares** (Portugal) said that the Commission had indicated for each topic specific issues on which the comments of Governments would be of particular interest to it. In that regard, he welcomed the initiative of Austria and Sweden aimed at revitalizing the debate on the Commission's report in the Sixth Committee.

26. The topic of responsibility of international organizations was a complex one. Following closely the draft articles on State responsibility was a good starting point, but it must be borne in mind that there was much diversity among international organizations as subjects of international law and that they differed in many respects from States. Portugal supported the statement made on behalf of the European Union and approved of the current wording of articles 1 and 3. With regard to article 2, he agreed with the Commission's decision to adopt a definition of international organizations that served only the purposes of the draft articles. However, careful consideration should be given to the reference in that article to entities other than States which participated in international organizations. While it was true that a number of such entities did participate in such organizations, they normally did so as associated or affiliated members and not as full members. There was a need to clarify in which circumstances such entities could incur international responsibility for an act of an international organization, taking into account article 1, paragraph 2, of the draft articles. He invited the Commission to give further consideration to the question whether international organizations could be established by other instruments governed by international law, bearing in mind the need to distinguish real international organizations from mere bodies of such organizations.

27. He welcomed the intention of the Special Rapporteur to tackle the complex issue of attribution in his next report and agreed that a general rule on attribution of conduct to international organizations should contain a reference to the "rules of the organization". The definition of those rules appearing in article 2, paragraph 1 (j), of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was an adequate starting point. However, taking into account the fact that the definition contained the words "in particular", other components of the rules of the organization might be considered with a view to formulating a more exhaustive definition. The reference to the established practice of the organization also deserved further attention. The question of the extent to which the conduct of peacekeeping forces was attributable to the contributing State or to the United Nations was a very complex one. First, it could also arise in connection with other international organizations, namely those assisting the United Nations in peacekeeping missions. Second, the agreements concluded by the organization and the contributing State could include specific provisions on the issue of attribution of responsibility. Lastly, before any decision was taken on possible responsibility relationships involving the international organization and the State, the practice of the United Nations and other international organizations should be carefully considered.

28. **Mr. Tarabrin** (Russian Federation) said that his delegation welcomed the progress made by the Commission at its fifty-fifth session, especially with regard to the topic of diplomatic protection and the initiation of work on responsibility of international organizations. Although such organizations were playing an increasingly important role, many aspects of their activities remained controversial. The general approach taken by the Commission in considering that topic deserved support, particularly its decision to take as a basis for the work its articles on the responsibility of States for internationally wrongful acts. That decision would make it possible to limit the work to consideration of the internationally wrongful acts of international organizations, leaving aside questions of material responsibility: the responsibility of States for the conduct of international organizations was one of the issues most urgently requiring regulation by a set of articles.

29. For the first time, efforts were being made to formulate a substantive legal definition of the concept of an international organization. It was clear that such a concept had to form a keystone of the draft articles on responsibility of international organizations. During the discussion in the Commission, doubts had been expressed concerning the need to depart in the draft articles from the official definition of an international organization. An international organization was an intergovernmental organization: that definition appeared in various international conventions, such as the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. His country shared those doubts to some extent. However, since the draft articles referred specifically to intergovernmental organizations as the only category of international organizations that were subjects of international law, that did not seem to be a cause for concern. With regard to the other elements of the definition, the existence of an international treaty or the fact that States were members were necessary only for the purpose of determining the existence of the legal personality of an international organization and could be transferred to the commentary or be included in a separate article.

30. With regard to the attribution of conduct to an international organization, according to the principle established in the articles on State responsibility, conduct was attributed to a State under international law. That principle should also be applied to international organizations, bearing in mind that most of the rules of international organizations formed part of international law. There was no reason to assume that the definition of "rules of the organization" contained in article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations was not adequate.

31. Concerning the extent to which the conduct of peacekeeping forces was attributable to the contributing State or to the United Nations, the Special Rapporteur, in one of his reports on international responsibility of international organizations, had referred to two cases involving that issue: in the first, armed forces of the United States and other countries, under United States command, had carried out an

operation in Korea in 1950 in the name of the United Nations. The second case had occurred in the Congo, where United Nations forces composed of national contingents had been deployed under the command of a commander appointed by the United Nations. In the latter case, the responsibility for damage caused during the operation had been assumed by the United Nations, while in the first the United States had been willing to provide compensation for the damage. On the basis of those examples, the Special Rapporteur had concluded that a decisive factor in determining whether responsibility was incurred by the State or the organization was the principle of "effective control". His country agreed with that conclusion, although that did not exclude the need for a more thorough study of the subject, and especially the issue of the legality or illegality of the operation. If the organization decided to approve an illegal military operation, it should assume the corresponding responsibility, together with the States carrying out the operation, irrespective of whether it exercised effective control or not.

32. **Mr. Yáñez Barnuevo** (Spain) said that the Commission's 2004 report should indicate the objectives for the quinquennium, and that no new topics should be included for the time being.

33. With regard to the international responsibility of the State, the latter was both an active subject and a passive subject of responsibility relationships; in other words it was sometimes the responsible subject and sometimes the injured subject. However, the Commission's report referred to the responsibility of international organizations, i.e., the international organization as a possible responsible subject, but it was unclear which entity would be the passive or injured subject. In principle, it could be any subject of international law, either a State or another international organization. It was strange that no thought had been given to the inverse relationship, i.e. where the international organization might be the injured subject and the responsible subject might be a State. The Commission should give further thought to that fundamental issue.

34. In addition to the draft articles on the international responsibility of the State, the Commission should take into account current practice and certain academic works, such as those of the International Law Association and a study by the Instituto Luso Hispano Americano de Derecho Internacional on international organizations and responsibility relationships. In that study, organizations were treated both as active subjects and passive subjects. The Commission had taken the same approach when dealing with the topic of the law of treaties, in that it had first codified the law of treaties between States, leading to the adoption of the 1969 Vienna Convention on the Law of Treaties between States, and had subsequently adopted the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Consequently, it would be advisable to undertake a comprehensive study of the law of responsibility relationships of international organizations, both inter-organizational and between organizations and States.

35. With regard to methodology, it was important to take the draft articles on the international responsibility of States as a starting point, but it should be borne in mind that in the international legal order the State was a primary subject with substantially consistent characteristics. International organizations, on the other hand, were secondary subjects established by States and were intrinsically diverse in their methods of establishment, personality, powers and methods of operation. It was therefore necessary to study the practice of international organizations in that regard and analyse carefully those areas of their activities in which questions of international responsibility might arise.

36. International organizations, at least those which were authentic subjects of international law, possessed in principle the general capacity to participate both actively and passively in legal relationships involving international responsibility, but within the limits of their legal personality and the content and scope of their powers.

37. With regard to the articles provisionally approved by the Commission, a provision could be drafted defining the relationship between the new set of draft articles and those on the international responsibility of States. There also seemed to be a certain amount of contradiction between paragraphs 1 and 2 of article 1. Further thought should be given to the scope of paragraph 2.

38. With regard to article 2, the Commission was apparently not satisfied with the definition of the term "international organization" contained in other codification conventions. It was not adequate to define

an international organization simply as an "intergovernmental organization"; it would be more appropriate to refer to an "inter-State organization". The definition proposed by the Commission was likewise unsatisfactory. The first part could serve as a starting point, but the last sentence was particularly infelicitous. There was merit in the alternative version proposed by France, which could serve as a basis for the formulation of acceptable wording. The international organization in question was an international organization established by States and consisting basically of States; that was the only way in which the issue of residual international responsibility could be approached.

39. Article 3 deserved to be approved in principle, although it would probably require more attentive re-examination in the light of subsequent articles.

40. With regard to the Commission's questions concerning the attribution of conduct to an organization, a general rule should be formulated without prejudice to the subsequent formulation of specific rules on various relevant aspects of the subject. The general rule should contain a reference to the "rules of the organization", since that was the basic assumption underlying the attribution of conduct to the organization. However, steps must be taken to prevent an international organization from trying to evade responsibility for the conduct of an entity which was in fact acting as one of its organs by simply denying that the entity was an organ according to the rules of the organization. Consequently, it would be necessary to establish objectively or on the basis of the views of third parties the standing of the individual or entity acting for the account or on behalf of the organization. The best starting point for the definition of the "rules of the organization" would be the definitions contained in the 1986 and 1975 Vienna Conventions, especially the former. In that definition, special attention should be paid to the reference to the "rules of the organization", which in general had the advantage of preserving the individuality of each organization and did not prejudge the degree of systematization required in order for the rules to constitute a genuine internal order of the organization. In that regard, he fully supported the statement made by Italy on behalf of the European Union and the statement by the representative of the Commission.

41. With regard to the conduct of peacekeeping forces, he agreed with the many speakers who had drawn attention to the complexity and sensitivity of that issue, which did not refer or should not refer solely to United Nations peacekeeping forces, since regional or other organizations might well be active in that field. The Commission should study thoroughly existing practice and the agreements between international organizations and contributing States, as well as the practice of States hosting such operations and the practice of the Security Council, the agreements dealing with claims in specific places and the existing incipient arbitral practice. Control was the key, although it was common knowledge that the concept of control was controversial in international law. In the case of peacekeeping forces, the key concept would probably be operative or operational control, but that should be determined in the study his country was proposing. Spain reserved the possibility of discussing that subject more thoroughly in the written comments it would subsequently address to the Commission.

42. **Ms. Kamenkova** (Belarus), referring to responsibility of international organizations, said that the general rule on the attribution of conduct to an international organization should include a reference to the "rules of the organization". From the legal standpoint, the rules of the organization were very important, not only for regulating the inter-institutional issues arising in connection with the activities of international organizations, but also for defining the relationship between their organs and member States and for regulating relations between the organs and officials of the organization. Given the sphere of application of the rules of the organization, those rules could be very useful when tackling the question of attribution to the organization of internationally wrongful acts committed by one of its organs or officials, and when delimiting the responsibility of international organizations and States. The definition of the "rules of the organization" in article 2, paragraph 1 (j), of the 1986 Vienna Convention embodied the main normative means by which international organizations regulated their internal operations and other questions relating to their activities. In attributing conduct to international organizations, the only rules to be taken into account were those of a normative character with special legal significance, and that should be reflected clearly in the draft articles.

43. It was important to delimit the extent of the responsibility of the United Nations and of Member

States contributing military, police or civilian contingents for peacekeeping operations under its control. Two issues arose in that regard: the proportional distribution of responsibility between the United Nations and contributing States for damage caused by United Nations personnel in the course of peacekeeping operations as a result of acts which were not prohibited by international law, and the attribution of responsibility for damage caused by a breach of the norms of international law and the mandate of a given operation. In the first case, the responsibility incurred by contributing States would be divided among them according to the extent to which their contingents had actually participated in the activity linked to the damage caused. In the second case, the starting point should be the mandate of the peacekeeping operation, the efficiency of the general leadership and the control exercised by the United Nations during the operation. The responsibility of a State for damage caused by a breach of the rules of international law by its contingent and the requirements of the mandate of the operation could be secondary or residual in character in relation to the responsibility of the United Nations, provided that the State concerned had not intervened directly in the operations in question.

44. Lastly, she wished to express a reservation concerning paragraph (14) of the commentary to article 2 of the draft articles in the Commission's report, according to which the question of the international responsibility of States as members of an international organization arose only with regard to States that were members of the organization. If a State committed internationally wrongful acts together with other States members of an international organization, its individual material responsibility vis-à-vis a third State which was not a member of the organization should not be entirely excluded. Failure to include in the draft article rules on the responsibility of States as members of international organizations would leave a serious gap in the institution of international legal responsibility and in the regulation of relations between States and international organizations. The question of the material responsibility of States for specific acts performed by international organizations could be resolved within the framework of the draft articles on the basis of the principles of solidarity and residual responsibility.

The meeting rose at noon.

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Summary record of the 16th meeting
Held at Headquarters, New York, on Wednesday, 29 October 2003, at 10 a.m.

Chairman: Ms. Ramoutar ..... (Trinidad and Tobago)
later: Mr. Baja ..... (Philippines)

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Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (*continued*)

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03-58507 (E)

The meeting was called to order at 10 a.m.

Agenda item 152: Report of the International Law Commission on the work of its fifty-fifth session (*continued*) (A/58/10)

1. **Mr. Ramadan** (Egypt) emphasized the great complexity of the topic of responsibility of international organizations, whose rules should be codified. He said that a reference to the "rules of the organization" should be included in the draft articles; since such rules normally took the form of a treaty and constituted international law, when they were violated international law was violated. The wording of the draft article on responsibility of international organizations should be similar to that of article 2 of the 1986 Vienna Convention, in the interest of achieving standardization and a form of codification that left no room for reopening discussion of issues on which agreement had already been reached.

2. In principle, the conduct of peacekeeping forces was attributable to the United Nations, but if the injured State demonstrated to the extent that it was able that a violation by peacekeeping troops was an infringement of their United Nations mandate, the conduct in question should be attributed to the contributing country.

3. With regard to draft article 1, paragraph 1, on the scope of the articles, a cause-and-effect relationship between the wrongful act and the harm caused should be established. Under paragraph 2 of article 1, on international responsibility of a State for the internationally wrongful act of an international organization, it was a requirement that it should be possible to demonstrate the responsibility of the State or the international organization possessing legal personality. If the organization acted independently of member States, it should be regarded as responsible. However, responsibility would be attributable to the State if it could be shown to have acted in bad faith and in its own interest. In such a case, to the extent that it was able, the injured State must provide the courts with evidence that that was so.

4. Draft article 2, entitled "Use of terms", referred to the legal personality of the organization. His delegation did not consider such a requirement necessary, because the essential element was the organization's independent will vis-à-vis the will of States. United Nations decisions attributing responsibility to international organizations took account of the fact that the general rules of the organization were normally laid down in treaties that had been codified and formed part of international law. Delegations that maintained that national courts could take up the issue of responsibility of an international organization should take into account the Commission's view that the conduct of international organizations could be seen only in the context of international law. The Commission should therefore consider the matter and decide whether the International Court of Justice was competent to deal with matters relating to the United Nations and its specialized agencies and other bodies in the United Nations system. If the Commission concluded that the Court was competent to deal with disputes in such a tricky field of law, that could give rise to other questions. For example, if the Security Council did not take a decision because a State had used its veto, such an omission could be regarded as a violation of international law, and the matter should be taken to the Court. That could have certain implications if the injured State claimed that a State had used its veto in its own interest, and if it proved that that was so. The question of the Court's competence in matters relating to the United Nations was important, and such issues could not just be set aside or be entrusted to national courts.

5. **Mr. Masud** (Pakistan) said that responsibility of international organizations was indeed a complex subject, and he agreed with those representatives who had emphasized the need for extensive study of the limited case law on the subject, as well as practice. With regard to draft article 1, he considered paragraph 1 quite satisfactory. Paragraph 2, however, needed to be clarified: in order to assume responsibility for the acts of an international organization, a State had to be a member State, which was a matter that was not dealt with in that paragraph. He therefore proposed that the term "a member State" should be used instead of "a State".

6. Draft article 2 raised the issue of how to define an international organization; the organizations covered by the articles should be of an intergovernmental nature. Some organizations had as members entities that were not States; the issue of the responsibility of such entities would therefore have to be addressed so as to determine, for example, whether they had legal

personality and whether they could undertake international obligations.

7. The text of draft article 3, on the attribution of conduct to an international organization, was satisfactory. It would be necessary to decide whether a general rule should contain a reference to the "rules of the organization", as defined in the Vienna Convention. It would therefore be necessary to clarify whether international organizations had limited or full legal personality. Some judgments of the International Court of Justice indicated that their powers were limited to those vested in them by States, and the limits of those powers were determined by the common interests whose promotion States entrusted to the international organizations.

8. There was no case law on the issue of responsibility for the conduct of peacekeeping forces, because the Charter had no provisions on peacekeeping operations and did not envisage any use of force by the United Nations against States. There had been a legal controversy relating to the competence of United Nations organs to take decisions relating to the establishment of peacekeeping operations and the obligation of States to contribute to such operations. In the absence of a clear provision in the Charter, it was difficult to determine whether the conduct of peacekeeping forces was attributable to the troop-contributing State or to the United Nations.

9. *Mr. Baja (Philippines) took the Chair.*

10. **Mr. Shi Jiuyong** (President of the International Court of Justice) said that the work of the Sixth Committee was of the highest importance and relevance to the International Court of Justice. The Court was the principal judicial organ of the United Nations. Its role consisted in deciding disputes that were submitted to it under international law. Since the Sixth Committee was charged with the development of international law and its codification, the link between the two institutions within the framework of the United Nations was self-evident. Since both bodies worked towards the same goal, it was their duty to perform their tasks in permanent awareness of each other's activities. The follow-up of the Committee's work was facilitated by its press releases and publications. As for the work of the Court, it was widely publicized and accessible to all through the Court's web site and its annual reports to the General Assembly.

11. The programme of work before the Sixth Committee was heavy and diverse. Many of the items on the Committee's agenda for the fifty-eighth session, such as the convention on jurisdictional immunities of States and their property, strengthening the role of the United Nations, following up on the International Criminal Court and the study of measures to eliminate international terrorism, were extremely important for the international community and the development of international law. The International Court of Justice would remain very attentive to the work of the Sixth Committee.

12. **Mr. Isong** (Nigeria), referring to the responsibility of international organizations, said that articles 1-3, which had been provisionally approved, the commentary thereto, the related conceptual clarifications and the envisaged linkages with relevant articles on the responsibility of States for internationally wrongful acts were bound to facilitate future deliberations and exchanges of ideas.

13. With regard to draft articles 17-22, a State was entitled to exercise diplomatic protection in respect of an injury to a corporation that had the nationality of that State. However, adequate guarantees should be provided for foreign investments, taking into consideration the concerns of the investing corporation and its shareholders, regardless of their nationalities. Nigeria had therefore put in place an investment regime aimed at creating, through the activities of a series of institutions established for that purpose, a stable and secure environment intended to protect foreign investors while ensuring delivery of quality services to the country.

14. Nigeria continued to live with the painful memory of the 1988 dumping in its territory of between 40 and 50 tons of radioactive industrial waste that had caused great damage to the health of the population and the environment. The Nigerian Government had had difficulty in dealing with the problem at the time, because no relevant international legal instrument had been available. Nigeria therefore welcomed the work done on international liability for injurious consequences arising out of acts not prohibited by international law, and appreciated particularly the attention paid to the definitions and interpretations of the terms "prevention", "liability", "compensation" and "allocation of loss" and the links between them. The rigorous examination of the legal regime on the allocation of loss and the analysis of

liability under various regimes would no doubt facilitate the Commission's work.

15. Nigeria was in favour of a study to determine the extent to which recent environmental disasters were the result of a violation of the duty of prevention. The dumping of all forms of hazardous waste continued to constitute one of the cardinal socio-economic and security threats to the world, particularly to developing countries, and made such a study all the more necessary.

16. His Government endorsed the Special Rapporteur's intention to embark on a study of State practices with respect to uses and management of shared natural resources, including pollution prevention and cases of conflicts, as well as national and international rules. Nigeria saw merit in the Special Rapporteur's emphasis on undertaking further study of the technical and legal aspects before making a final decision on that matter, and requested the Commission to consider the technical needs of developing countries with a view to enhancing their capacity to participate effectively in work on the topic. The title of the topic had to be unambiguously defined in order to shed more light on the meaning of the word "shared". Cognizant of the crucial concerns relating to the topic, Nigeria continued to consider the report and would make its reactions available to the Commission at a later date.

17. **Mr. Candioti** (Chairman of the International Law Commission) said that in the current year the Drafting Committee had focused on the draft articles relating to the exhaustion of local remedies rule. Subsequently, on the proposal of the Drafting Committee, the Commission had adopted draft articles 8 [10], 9 [11] and 10 [14], together with the relevant commentaries.

18. Article 8 [10], entitled "Exhaustion of local remedies", codified the customary international law rule under which the exhaustion of local remedies was a prerequisite for the presentation of an international claim. The provision should be read together with article 10 [14], laying down the circumstances in which local remedies did not need to be exhausted. Paragraph 2 was of necessity expressed in general terms, referring to remedies which were "as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special". It had not been possible to provide an exhaustive list of specific remedies, since they were subject to variation from State to State.

19. Article 9 [11], entitled "Category of claims", dealt with the classification of claims for purposes of the applicability of the exhaustion of local remedies rule. It gave effect to the basic proposition that the exhaustion of local remedies rule applied only to cases where the claimant State had been injured "indirectly", typically through its national, not where it had been injured "directly" by the wrongful act of another State. However, it had been recognized that it was not always clear whether a claim was "direct" or "indirect". The Commission had considered several possible tests and settled for the preponderance test. Hence, for a claim to be "indirect" in nature, it had to be brought "preponderantly on the basis of an injury to a national" or other person entitled to diplomatic protection under draft article 7 [8]. In addition, the provision applied both to the bringing of international claims and in respect of requests for declaratory judgements.

20. Article 10 [14] recognized four exceptions to the exhaustion of local remedies rule: where the remedies provided no possibility of effective redress; where there was undue delay in the remedial process attributable to the State alleged to be responsible; where there was no relevant connection between the injured person and the State alleged to be responsible or the circumstances of the case otherwise made the exhaustion of local remedies unreasonable; and where the State alleged to be responsible had waived the requirement that local remedies be exhausted.

21. It should be remembered that the issue had been exhaustively debated in 2002, especially in regard to the requirement of a "voluntary link": eventually, it had been decided to abandon any reference to a "voluntary" link in paragraph (c) in favour of a more general provision dealing with the question of reasonableness, while including a reference to the existence of a "relevant connection between the injured person and the State alleged to be responsible".

22. The Commission had considered and sent to the Drafting Committee draft articles 17 to 22, dealing with the diplomatic protection of legal persons. The main issue in the discussion of draft article 17, which recognized the right of States to exercise diplomatic protection in respect of an injury to a corporation which had the nationality of that State, had focused on the criterion for establishing the "nationality" of a

corporation. Various suggestions had been made, including: the nationality should be that of the State of incorporation, the place of the registered office, the place of domicile or *siege social*, or a genuine link criterion. While that draft article established the basic principle that it was for the State of nationality of the corporation to exercise diplomatic protection, the Special Rapporteur had proposed several exceptions to that rule in draft article 18, namely that the State of nationality of the shareholders could exercise diplomatic protection where the corporation had ceased to exist in the place of its incorporation, or where the corporation had the nationality of the State responsible for causing injury to it. The latter exception had occasioned the most debate in the Commission, where varying views had been presented, ranging from expressions of concern that its inclusion would be highly controversial and potentially destabilizing to expressions of support for the policy rationale for its inclusion.

23. Draft article 19 contained a saving clause designed to protect the rights of shareholders whose own rights, as opposed to those of the company, had been injured by an internationally wrongful act. The basic principle was that such shareholders retained the independent right of action in such cases, and hence qualified for diplomatic protection in their own right. That draft provision had met with general approval in the Commission.

24. Draft article 20 established the principle of continuous nationality in the context of diplomatic protection of legal persons, and was the counterpart to article 4 [9], adopted in 2002, which dealt with the same issue in the context of natural persons. That provision had not caused much difficulty for the Commission and had been referred to the Drafting Committee, on the understanding that it should be harmonized with article 4 [9].

25. One of the main issues raised during the Commission's discussion of the topic had been the treatment to be given to bilateral investment treaties, a common feature of which was the exclusion of the rules of customary international law relating to diplomatic protection. The Special Rapporteur had proposed the inclusion in draft article 21 of a *lex specialis* provision making it clear that the draft articles did not apply to the special regime provided for in bilateral and multilateral investment treaties. That draft article had been the subject of some debate and the Commission had eventually decided that the Drafting Committee should reformulate it as a "without prejudice" cause, to be included in the final version of the draft.

26. With regard to draft article 22, it should be noted that in addition to corporations, which were the most common example of a legal person that had in the past enjoyed diplomatic protection, other legal persons created under domestic law engaged in cross-border activities and might be victims of an internationally wrongful act. Since it would not be feasible for the Commission to formulate rules for each and every type of such entities, article 22 contained a mutatis mutandis clause extending the rules applicable in the case of corporations to other legal persons.

27. Delegations might consider commenting on the questions raised in chapter III of the report on the diplomatic protection of members of a ship's crew by the flag State and the diplomatic protection of nationals employed by an intergovernmental international organization. The Special Rapporteur intended to produce in 2004 a final report covering those two issues so that the first reading could be completed at the same session. Governments might also wish to comment on other issues that merited consideration and were not covered by the draft articles.

28. With regard to chapter VI of the report, he noted that following the adoption in 2001 of the draft articles on prevention of transboundary harm resulting from hazardous activities, the Commission had in 2002 resumed its consideration of the liability aspects of the topic and had established a Working Group which had considered the conceptual outline and set out some initial understandings on the topic. In adopting the report of the Working Group, the Commission had endorsed its recommendations that: (a) the scope of the topic of liability should be limited to the activities covered by the draft articles on prevention, namely activities not prohibited by international law which involved a risk of causing significant transboundary harm through their physical consequences; the Commission should concentrate on harm caused for a variety of reasons not necessarily involving State responsibility for wrongful acts; (c) the topic should be dealt with as an issue of allocation of loss among different actors involved in the operation of the hazardous activities; and (d) the topic should cover loss to persons, property, including the elements of State

patrimony and natural heritage, and the environment within natural jurisdiction.

29. At its 2003 session, the Commission had considered the first report of the Special Rapporteur dealing with the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, according to which: (a) each State must have as much freedom of choice within its territory as was compatible with the rights and interests of other States; (b) the protection of such rights and interests required the adoption of measures of prevention and, if injury nevertheless occurred, measures of reparation; and (c) insofar as might be consistent with the two preceding principles, the innocent victim should not be left to bear loss or injury. In the view of the Special Rapporteur, while the draft articles on prevention had addressed the first objective and partially the second objective, the Commission still had to address the remaining elements of the policy. To that end, States should be encouraged to conclude international agreements and to adopt suitable legislation and implementing mechanisms for prompt and effective remedial measures, including compensation for activities involving a risk of causing significant transboundary harm. Although any regime of liability and compensation should aim at ensuring that as far as possible the innocent victim was not left to bear the loss resulting from transboundary harm arising from hazardous activity, it might not be possible to obtain full compensation in each case, given problems with the definition of damage, difficulties relating to proof of loss, problems relating to the applicable law, limitations on the operator's liability and the limitations within which contributory and supplementary funding mechanisms operated.

30. The report reviewed sectoral and regional treaties and other instruments for allocation of loss in case of transboundary harm, on the basis of which the Special Rapporteur had drawn attention to their common features and had noted in particular that the legal issues involved in a civil liability system were complex and could be resolved only in the context of each specific case, depending on the jurisdiction in which the case was instituted and the applicable law. Furthermore, although it was possible to negotiate specific treaty arrangement to settle the legal regime applicable for the operation of an activity, the Special Rapporteur had refrained from drawing any general conclusions on the system of civil liability. The Special Rapporteur had concluded by making several submissions for consideration by the Commission, which, if found generally acceptable, could constitute a basis for drafting more precise formulations.

31. During the debate, the members of the Commission had expressed different views on the viability and conceptual framework of the topic, on the terminology used and the various issues raised by the Special Rapporteur in his report, including the general scope of the topic, the threshold of liability, the relevance of civil liability regimes and the instruments analysed. The Commission had also made specific comments on the summation and submissions of the Special Rapporteur, including the nature of a future instrument. Although the topic remained conceptually confounding, the Commission might be able to achieve a realizable objective, and would be assisted in its work by the comments of Governments on the various elements referred to in paragraph 174 of the report. Since the operator was likely to bear the primary liability, comments would be particularly useful on the following points: the various procedural and substantive requirements that the State should place on an operator; the basis of any liability system (whether it should be strict, fault-based, both or neither of the two); the limits to allocation of the loss to the operator; and supplementary sources of funding, including the nature and extent of State funding. Comments would also be welcome on the extent to which damage to the environment per se should be covered by the topic, as well as on the final form that the work should take.

32. **Mr. Popkov** (Belarus), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that the Commission must consider the topic because of the risk of transboundary harm arising out of the use of very dangerous resources. Belarus, which had suffered the consequences of the Chernobyl disaster, was well aware of the problem facing States affected by transboundary harm when it came to remedying the consequences and restoring the environment. Without corrective measures or sufficient financial resources, those States could not deal with such complicated problems single-handedly. Consequently, a comprehensive convention should be drawn up regulating the prevention of harm and the corrective measures to be taken, especially for the elimination of the harm and the compensation of those affected. The future convention should provide for liability of the

operator irrespective of fault, as had been done in various international agreements on liability for harm caused by specific types of lawful hazardous activities. Since the use of technology capable of causing transboundary harm might have serious consequences for the functioning of economic systems and other social systems, and affect substantial individual interests, limits had to be established for the attribution of harm to the operator. The part of the harm not covered by the operator should be covered by the State to which that operator belonged. Similarly, special compensation funds should be established with contributions from the States concerned. The future convention should guarantee to the maximum compensation for harm caused to individuals and the environment.

33. The draft articles should not include rules providing for the diplomatic protection of members of the crew of ships, aircraft or space vehicles who were not nationals of the flag State or the State of registration. The question of the protection of crews by States could be resolved within the context of special international treaties, as provided, for example, in article 292 of the United Nations Convention on the Law of the Sea.

34. With regard to the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case, there was no need to examine in the draft articles the problem of international organizations which protected their personnel, since that involved functional responsibility, which was linked to the specific rights and interests of those organizations. However, there was no reason why the rules of diplomatic protection should not be applied to that case by analogy.

35. A special article should be included on the application, mutatis mutandis, of the provisions on diplomatic protection of corporations to other legal persons. That article should emphasize that diplomatic protection could only be offered to other legal persons for the purpose of defending their property and commercial rights vis-à-vis third States. There were good reasons for setting aside the possibility of applying the articles on diplomatic protection to non-governmental organizations, which in most cases did not maintain sufficient links with the State of registration in the exercise of their international functions and therefore could not request protection.

36. **Mr. McDorman** (Canada) said that the diplomatic protection of the crew and passengers of a ship who were not nationals of the flag State was a complex issue of international law which was being studied by his country. The Special Rapporteur's final report would also cover the diplomatic protection of nationals employed by intergovernmental organizations in the context of the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case. With regard to the diplomatic protection of corporations and shareholders, the Special Rapporteur had proposed that the *Barcelona Traction* rule should be adopted, and in that regard it had to be determined whether that rule was an accurate statement of customary international law or whether international law had evolved since the adoption of the decision. Canada had relied on that rule in past litigation as being a correct statement of the current state of customary international law.

37. Another issue to be considered was whether the development and prevalence of bilateral and multilateral investment treaties had moved customary international law away from the *Barcelona Traction* rule to a point where the State of the shareholder had an independent right of action. As the Special Rapporteur had noted, in the *Barcelona Traction* case investment treaties had been treated as *lex specialis* and if they had not become part of customary international law they should continue to be treated as such. It could be argued that the fact that tribunals still considered the *Barcelona Traction* rule to be a true statement of customary international law was the driving force behind the desire of States to enter into bilateral or multilateral investment treaties. Canada therefore agreed with the approach taken by the Special Rapporteur in developing the articles on diplomatic protection of corporations and shareholders.

38. **Mr. Winkler** (Austria) referring to draft article 9, entitled "Category of claims", questioned whether the specific reference to a "request for declaratory judgement" should be retained. The sole decisive criterion in that context was whether or not there was direct injury to the State, and the introduction of a possible further criterion would only create confusion. The text seemed to suggest that a "request for a declaratory judgement" was to be distinguished from any other "international claim". He therefore suggested that that criterion should be deleted from the text of

draft article 9 and dealt with exclusively in the commentary.

39. He wished to make two comments on draft article 10. First, for the sake of uniformity, paragraph (a) should contain a reference to the *availability* of local remedies similar to that in article 44, paragraph (b) of the Commission's articles on State responsibility. Second, draft article 10, paragraph (c), could include the requirement that there should be a "relevant connection" between the injured individual and the State alleged to be responsible. The examples cited by the Special Rapporteur in his commentary were striking, but even outside the field of transboundary environmental harm there were numerous situations where acts of States had extraterritorial effects and caused injury to individuals abroad. The current wording of paragraph (c) and the commentary left a number of questions unanswered, and the Commission could prepare a more precise definition of the term "relevant connection".

40. In the draft articles on the diplomatic protection of corporations and shareholders, there was an inconsistency between draft article 17, paragraph 2, from which the reference to the criterion of incorporation for defining the nationality of corporations had been deleted, and draft articles 18 (a) and 20, in which the references to that criterion had been maintained.

41. With regard to the question whether new issues should be dealt with, in addition to the nationality of ships and crews and the diplomatic protection of officials of international organizations, Austria considered that the Commission should focus on the issues currently under consideration.

42. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, and more specifically the procedural and substantive requirements that the State should place on the operator, he considered that in the case of damage caused by hazardous activities, no strict proof of cause or connection should be required, since such activities involved complicated scientific and technological elements. Furthermore, the requirement of strict proof of cause or connection would place a heavy burden on victims, which would limit the effects of a liability regime and even give rise to questions regarding the usefulness of a specific liability regime for hazardous activities.

43. With regard to the basis and limits of allocation of loss to the operator, "allocation of loss" was a new concept which did not appear in other instruments dealing with liability. Although that term made it possible to overcome certain conceptual difficulties, it needed to be further clarified and its implications understood in regard to traditional liability regimes, which were based on the term "damage". Moreover, the objective of liability regimes was not actually allocation of loss but allocation of the duty to compensate for damage deriving from acts not prohibited by international law.

44. Concerning the extent to which damage to the environment should or should not be covered, he believed that the definition of "damage" eligible for compensation should be understood in the traditional sense as damage to persons and property, and that the Special Rapporteur's proposal provided a good working basis in that regard. The threshold of liability should be the same as that used in the draft articles on prevention, namely "significant harm".

45. Lastly, it would be premature to discuss the final form of the Commission's work on the topic, since the solution would depend on the development of specific liability regimes in the future. However, the outcome of the Commission's work could also take the form of a "checklist" enumerating the issues which needed to be taken into consideration in future negotiations on the establishment of liability regimes for specific activities.

46. **Mr. Bennouna** (Morocco) said that diplomatic protection was a topic on which abundant international practice existed, on which an *opinio juris* had emerged over the centuries and on which there were many judicial decisions. The time had therefore come to codify it so that it would acquire the certainty and precision of written law and be adapted to the developments that had occurred in relations between States, especially in the economic and trading spheres. With regard to the discussion on paragraph 2 of article 17, concerning the definition of the State of nationality of the legal person and the resulting possibility of protecting it internationally when it suffered an injury caused by another State, Morocco understood that the criterion followed by the International Court of Justice in the *Barcelona Traction* case should be adapted to the current state of international economic relations. It was not sufficient simply to use the formal criterion of the law of the country where the corporation had been

incorporated, and Morocco therefore considered it important that there should exist a genuine link between the corporation and the country under whose law it had been incorporated. That link did not necessarily have to be related to the volatile majority of its shareholders.

47. With regard to the exceptions to the application of the law of the State of nationality of the corporation that would allow the State of nationality of the shareholders to exercise diplomatic protection, Morocco supported the provisions of article 18, which was based on the precedent established in the *Barcelona Traction* case and designed to avoid shareholders being left unprotected when the legal person had ceased to exist or when it had the nationality of the State responsible for causing injury. With regard to the first exception, the text should specify what was meant by disappearance of the legal person and establish a time limit for the exercise of diplomatic protection on behalf of the shareholders. The second exception would apply when a corporation's shareholders had been directly injured by the internationally wrongful act of another State. Morocco would have preferred it if the Special Rapporteur had not distinguished between direct and indirect injury but had taken as a reference point the distinction between rights and interests of shareholders. In the cited judgement, the International Court of Justice had defined rights as "legally protected interests" and had given as an example the rights of shareholders to participate in corporate bodies and the right to dividends. In any case, it was perfectly feasible to combine the two exceptions mentioned in a single article.

48. The requirement of continuity of nationality up to the date of the presentation of the claim, established in article 20, was a rule that had arisen in connection with individuals and that, for reasons of juridical logic, should be extended to legal persons. On the other hand, there was no need for draft article 21 concerning *lex specialis*. Since the right to diplomatic protection was not peremptory in nature, it was the special regimes on investments or human rights that should indicate the preeminence to be given to the remedies that they envisaged in favour of individuals or of States. That being said, it was perfectly possible to include in the draft articles a saving clause on special protection regimes. With regard to article 21, concerning the protection of legal persons other than corporations, Morocco considered that, although the provisions on corporations should apply mutatis mutandis to other legal persons, a more in-depth analysis should be made of the structure and operating arrangements of non-governmental organizations before opening the way for their diplomatic protection by a State of nationality. The issue should be analysed more carefully before such a vague and broadly applicable rule as that contained in draft article 21 was established. In addition, it was not certain that such organizations would willingly accept the idea of protection by their State "of nationality", since many of them based their credibility on their complete independence from States.

49. **Mr. Fife** (Norway), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Sweden and Norway), recalled that it had been suggested that the study of international liability for injurious consequences arising out of acts not prohibited by international law (a topic that was difficult to distinguish from State responsibility *de lege lata*) was merely an attempt to construe artificial rules complementary to the classic theory of responsibility, whereby residual responsibility of a State could be established when it had not actually been proved that an internationally wrongful act existed. The Nordic countries believed that there were no grounds for such criticism.

50. The study of the topic was designed to identify obligations of States, including the obligation to act with due diligence in order to prevent transboundary harm from hazardous activities or to take active precautionary measures against such harm. A breach of those obligations naturally had consequences as regards responsibility. The preventive principle of good neighbourliness and cooperation and the customary obligation of the precautionary approach had been incorporated in a number of international instruments and were a corollary to the objective of sustainable development. That obligation could be summed up in the following manner: "Should there be a risk of serious or irreversible harm, an absence of absolute scientific certainty must not serve as a pretext to defer or postpone measures with a view to preventing damage". From that principle followed the obligation to conduct adequate studies to satisfy what, in certain situations, amounted to a reverse burden of proof. The general principles of law common to various legal systems and embryonic customary obligations related to the "polluter pays" principle, particularly those

articulated in principle 16 of the Rio Declaration, could provide guidance on primary obligations of States. Moreover, principle 2 of that Declaration reiterated the common conviction that States had the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

51. The Nordic countries believed that the goal of ILC was not only to prevent the injurious consequences of certain activities but also to draft an instrument that could protect innocent victims when harm occurred. Certain activities carried such risks, which experience showed could not be left solely to national civil liability mechanisms to resolve. Those who asserted the contrary were either supporting the current state of affairs which left innocent third parties unprotected or giving up attempts to clarify international rules in that area. The Nordic States understood the reluctance of some States to accept a system of allocating risks and losses to States rather than continuing to rely on rules of due diligence to provide a basis for liability. Nevertheless, a debate was essential in order to achieve effective protection and to protect innocent victims.

52. The Nordic countries believed that States should be given the necessary flexibility to develop schemes of liability suited to their particular needs. Such schemes should also take fully into account the particular needs of other States and of innocent victims of hazardous activities. To link liability to the person most in command and control of the hazardous activity was in line with the "polluter pays" principle. Relevant losses should be borne by the operator or shared by the operator and other actors; however, it was clear that a system based solely on the liability of operators or other players might not be sufficient to protect victims from aggravated loss, and the regime should therefore also include absolute State liability in cases where the operator was unable or unwilling to cover such loss. The Nordic countries agreed that liability should arise once the harm could reasonably be traced to the activity in question and that it was not necessary to rely on proof of causal connection between the harm and the activity. Damage to the environment per se must be compensable even if no direct loss had been identified and non-economic losses should also be included. That would offer the best environmental protection because those responsible would have a stronger incentive to take appropriate preventive and precautionary measures. As to the final form of work on the topic, the Nordic countries believed that a convention might be preferable, at least for the liability part.

53. With regard to mechanisms for funding loss and reparation, it had been proposed to base such funding on contributions from beneficiaries of the activity in question and from earmarked State funds. Such mechanisms might contribute to the protection of the victim and ease the burden on the liable operator or State. However, the main point was that losses derived from certain hazardous activities must not be allocated simply to innocent victims abroad, which implied that the liable State should bear the burden if the established funding was not sufficient. If strict liability of the responsible State was established as the overriding principle, it would be best for States themselves to develop formulas for allocation of loss and mechanisms for funding.

54. **Mr. Lammers** (Netherlands) said that the ruling of the International Court of Justice in the *Barcelona Traction* case should serve as a basis for the draft articles on diplomatic protection of legal persons, although his delegation believed that the rules set out in that case were not entirely satisfactory; however, his country had tried to remedy those imperfections by concluding bilateral and multilateral investment treaties.

55. Regarding article 17, he supported the position of the Working Group not to follow the "genuine link" doctrine, since the lifting of the "corporate veil" would create difficulties for courts and States of investment and it was necessary to avoid a formula that might suggest that a tribunal considering the matter should take into account the nationality of the shareholders controlling the corporation.

56. The Netherlands welcomed the subsidiary right of the State of nationality of the shareholders expressed in draft article 18 (a). It agreed that the State of nationality of the shareholders in a corporation should be entitled to exercise diplomatic protection on behalf of such shareholders if the corporation had the nationality of the State responsible for causing injury to the corporation. That exception to the rule should be considered favourably in the context of the progressive development of international law in that area.

57. His delegation supported the Special Rapporteur's proposal to delete draft article 21 and leave the issue of the *lex specialis* to the commentary.

There was no need to follow blindly the draft articles on responsibility of States for internationally wrongful acts. One possibility would be to reformulate the last part of the draft article, for example in the following wording: "without prejudice to special rules of international law".

58. With regard to draft article 22, although it was feasible to recognize the problem of protection of legal persons other than corporations, it would be preferable to make a more thorough examination of the issues involved, in view of the lack of State practice in that regard.

59. On another subject, it was necessary to determine whether protection given to crew members who held the nationality of a third State was a form of protection already covered by the Convention on the Law of the Sea or whether there was a need for recognition of the right to diplomatic protection vested in the State of nationality of the vessel. Firstly, under that Convention the flag State was competent to institute proceedings with a view to the prompt release of the vessel and all crew members, irrespective of their nationality. Secondly, the limited protection to be exercised by the flag State did not affect the right of the States of nationality of the crew members who did not have the nationality of the flag State to exercise diplomatic protection on their behalf. For that reason, the Netherlands believed that the current regime adequately covered the protection of crew members and that it was not necessary to include that question in the draft articles.

60. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation believed that such liability also arose in the event that a State had complied with its international obligations relating to an activity carried out under its jurisdiction or control, and agreed with the Special Rapporteur that States had an obligation to conclude international arrangements or adopt legislation to guarantee equitable allocation of loss within their domestic legal system. The model of allocation of loss to be developed by ILC should be general and residual in character and consist of a set of procedural minimum standards and substantive minimum standards. The former should address standing to sue, jurisdiction of domestic courts, designation of applicable domestic law, and recognition and enforcement of judgements. The substantive minimum standards should include the concept of damage, causal connection between damage and damage-causing activity, standard of liability (fault liability, strict liability, absolute liability), identification of liable persons, including the possibility of multiple tiers of liability, limits of liability (time limits, financial limits) and coverage of liability.

61. **Mr. Fyfe** (New Zealand) stressed the importance of the work on prevention and liability, since the two aspects were complementary. The Commission's work had addressed the duty of a State to take preventive action where hazardous activities in its territory or in areas beyond its territory but under its jurisdiction could cause adverse consequences for another State. However, it had to be recognized that, despite such preventive measures, accidents could happen that caused transboundary harm and economic loss. The Commission therefore needed to fill the gap by developing a series of articles which would match those prepared by it on the topic of prevention and would identify how to secure the provision of compensation and adequate allocation of loss in situations where no wrongful act was involved. That set of provisions should be of a residual and general character and would help to shape more detailed regimes for particular forms of specially hazardous activity.

62. The provisions should contain some general principles indicating that, to the extent feasible and practical in the circumstances, victims of transboundary harm from a hazardous activity should be helped to bear their losses; some provisions reflecting the fact that the operator, as the main beneficiary of the activity, the creator of the risk and the entity in the best position to manage the risk, should assume the first and principal responsibility for redressing any harm caused; an indication that strict liability on the part of the operator should be backed by insurance cover, with residual responsibility on the part of the relevant governments; and, lastly, appropriate dispute settlement arrangements.

63. With regard to the question of damage to the environment, thought should be given to the harm caused to the global commons. Compensation for such harm should not be limited to the cost of measures to restore the environment, which might not be possible and were difficult to quantify, but the possibility of compensation for the loss of intrinsic values should not be excluded.

64. With regard to economic loss where a person's ability to derive income was affected by an incident, the concept of economic loss should extend to loss incurred as a direct result of the perceived risk of physical consequences flowing from an incident.

65. Lastly, the instrument could take the form of a draft set of articles encompassing the actions expected of States and private actors, starting with prevention, including response and ending with liability. That would provide a general legal regime setting out the obligations of States in relation to hazardous activities which, while not unlawful, might cause harm and economic loss.

66. **Mr. Gandhi** (India), referring to the topic of responsibility of international organizations, said that the definitions in the 1975, 1978 and 1986 Vienna Conventions were specific to those instruments and that it was therefore necessary to develop a more precise definition for the current topic. Any definition of international organization included intergovernmental organizations, although non-State entities could also become members of international organizations in some cases. In that context, the Rapporteur had correctly suggested that non-governmental organizations should be excluded from the scope of the topic because they did not perform any governmental functions. Rather than the existence of a constituent instrument, it was the function of an international organization that should form the basis for its identification. The Rapporteur had rightly pointed out that it was more important that the organization should be performing functions as a legal entity in its own right and under its own responsibility, independently and separately from its members, so that the obligations and the wrongfulness of any impugned conduct could be attributed to that organization.

67. His delegation agreed with the recommendation made by the Special Rapporteur that the study should be concerned only with responsibility under international law and not with issues concerning international liability of international organizations, insofar as they involved issues relating to civil liability. In addition, the text of articles 1, 2 and 3 adopted by the Drafting Committee was acceptable to his delegation.

68. With regard to the question of liability regimes, the scope of the topic and the triggering mechanism should be the same as for prevention, since prevention and liability for allocation of loss were related and were sub-topics of the larger subject of international liability for injurious consequences arising out of acts not prohibited under international law. In order to address that type of liability, States generally preferred civil liability regimes that were sectoral in nature; however, the merit of having a strict liability regime could not be overemphasized. The discussions in ILC on an approach to liability that included payment of residual compensation by States appeared to be interesting; however, it must be remembered that not all States authorizing lawful hazardous activities had the means to pay residual compensation.

69. It should be borne in mind that the work of the Commission on allocation of loss suffered by innocent victims involved a fine balance between loss allocation to the victim of transboundary harm and the right of the State to claim reparation under rules of State responsibility. In that context, the recommendation made by the Special Rapporteur in his first report that States should have the flexibility to develop schemes of liability to suit their particular needs was very useful. The model of loss allocation proposed by the Commission should be of a general and residual nature, not impinging upon the remedies available at the domestic level or under rules of private international law.

70. India also supported the Special Rapporteur's recommendation that the primary liability should be that of the operator. In certain well-defined cases, State liability of a residual character might be of some use. State liability was largely an exception to State responsibility reflected in very few convention regimes, such as those governing space activities.

71. The establishment of a Working Group to fine tune some of the ideas in the Special Rapporteur's first report was a welcome move, and it was to be hoped that it would contribute to the early completion of work on that important subject.

72. **Ms. Secaira** (Guatemala) said that in paragraph (c) of article 10 [14] of the draft articles on diplomatic protection, the words "or impossible" should be inserted after "unreasonable", in order to take into account the case mentioned in paragraph (11) of the commentary, where a State denied an injured alien entry to its territory. The term "criminal conspiracies" was also unclear and should be replaced by "criminal activities". At the end of paragraph (3) of the

commentary, the phrase "or the respondent State does not have an adequate system of judicial protection" should be replaced by "or the judicial system of the respondent State is virtually ineffective or there are serious procedural irregularities in the case".

73. With regard to articles 17 to 22 on protection of corporations and other entities, diplomatic protection was complicated by two factors, namely, the existence of transnational corporations, whose activities, by definition, encompassed several countries, and the fact that shares of corporations changed hands very rapidly, with the resulting change of nationality of the shareholders. It was to be hoped that it would be possible to work out issues relating to diplomatic protection of companies in a satisfactory manner.

74. In some national legal systems there was no concept of "incorporation"; it was therefore correct to have deleted the term from article 17 as proposed by the Working Group and contained in paragraph 92 of the report. That would make for much better concordance among the English, Spanish and French versions. Her delegation proposed the following text, based on the Working Group's proposal: "For the purposes of diplomatic protection, in respect of an injury to a corporation, the State of nationality is that according to whose law the corporation was formed and with which it has a close and permanent connection". Nevertheless, that text should be expanded to take into account the case of a corporation which had a closer connection with a country other than the country according to whose law it was formed. To that end, the following phrase could be added to article 17: "If a corporation has a closer and more permanent connection with a State other than the State according to whose law it was formed than with that latter State, for the purposes of diplomatic protection its State of nationality shall be the first-mentioned State". Even with that addition, the drafting of the article was not entirely satisfactory, as it did not state which connections should be taken into account for the application of paragraph 2. On the basis of the suggestions contained in paragraph 85 of the report, her delegation recommended the addition of a third paragraph, which would read as follows: "For the purposes of the preceding paragraph, the nationality of the shareholders, the State in which the corporation has its basic economic activity or any other element which reflects the existence of a genuine link between the corporation and the State in question shall be taken into account".

75. With regard to the phrase in brackets contained in paragraph 2 of article 17, if the brackets were deleted, the following problem would arise: where the State in which the corporation was formed was different from the State in whose territory it had its registered office, the corporation would lack a State which could exercise diplomatic protection on its behalf. On the other hand, if the brackets were deleted, but the word "and" was replaced by "or", the result would be that if a corporation had its registered office in the territory of a State other than the one in which it was formed, there would be two States entitled to exercise diplomatic protection on behalf of the corporation. The best solution would be to delete the brackets and replace "and" by "or", on condition that a provision was added stating that, if the State in which the corporation was formed and the State in whose territory it had its registered office were different, the State entitled to exercise diplomatic protection on its behalf would be the one with which the corporation had the closest connection.

76. Article 18 would be easier to understand if it began as follows: "The State of nationality of the shareholders in a corporation shall be entitled to ...". It was doubtful whether article 18 would apply if the State of nationality of the corporation was not the same as the State of nationality of the shareholders. It would seem logical that article 17 could not apply in such a case, since it was inconceivable that an entity which did not exist could be protected. Nevertheless, it might be appropriate to state in the commentary on article 17 that the article would cease to apply to a corporation when the latter ceased to exist. The same statement could appear in the commentary on article 18, which would clarify the temporal connection between article 17 and article 18, paragraph (a).

77. Since article 18 referred to cases where the State of nationality of the shareholders could exercise diplomatic protection on their behalf, that article should not be mentioned in article 19. Moreover, it might be advisable to take into account the suggestion contained in paragraph 111 of the report, namely, that article 19 could be incorporated into article 18. Article 20 should not refer to a corporation incorporated under the laws of a State, but to a corporation having its nationality. With regard to article 21, the observation

contained in the last sentence of paragraph 131 of the report seemed pertinent.

78. **Mr. Shin** (Republic of Korea) said that he supported the initiative by Austria and Sweden to rationalize and revitalize the debate on the report of the International Law Commission and added that the advisory opinion of the International Court of Justice on the *Barcelona Traction* case was the basis for the current rules and practices governing foreign investments.

79. With regard to article 17, the State of incorporation was entitled to exercise diplomatic protection in respect of an injury to a corporation. With regard to the criterion for determining the nationality of a corporation, it would be preferable to delete the bracketed phrase in article 17, paragraph 2. Moreover, he saw no need for a genuine link requirement or for any requirement implying economic control. No genuine link had been required in the *Barcelona Traction* case, the Commission had not imposed a genuine link requirement on natural persons and, in light of the discretionary nature of the right of diplomatic protection, the genuine link was one of the factors that a State took into account when deciding whether to endorse the claims of the corporation against the State that had caused the injury.

80. His delegation had little difficulty with article 18, but it wished to point out that the situation envisaged in paragraph (b), concerning injury caused by the State of incorporation itself, had been a major concern for investing States and was now mainly addressed by bilateral investment treaties. With regard to article 21, he supported the Commission's decision to have the provision reformulated and located at the end of the draft articles as a "without prejudice" clause. Diplomatic protection should not be entirely excluded from bilateral investment treaties so that corporations and individuals might receive the maximum protection.

81. With regard to diplomatic protection of members of a ship's crew by the flag State, it was important for the draft articles not to prejudice the rules of the United Nations Convention on the Law of the Sea or the jurisprudence of the International Tribunal for the Law of the Sea in the Saiga case. The flag State should be entitled to exercise diplomatic protection for any injury suffered by members of the crew, irrespective of their individual nationalities, if the injury occurred in a situation in which the ship was considered a unit. As for the diplomatic protection of nationals employed by an intergovernmental international organization, the 1949 decision of the International Court of Justice in the *Reparation for Injuries* case should be fully respected. An international organization should be able to exercise functional protection on behalf of a person acting in its name in respect of any injury suffered during the performance of his or her duties. The right to functional protection should be justified by the need to ensure the independence of the international organization. The agent through whom the international organization acted should not be allowed to rely on the protection of his or her own national State, otherwise the agent's independence might be compromised. However, since functional protection was based not on the nationality of the victim but on his or her status as an agent of the international organization, any claim for injury not related to such status should be taken up by his or her State of nationality.

82. **Mr. Wada** (Japan) said that when discussing the issue of diplomatic protection in cases involving foreign investments, it was necessary to take into account developments in bilateral investment treaties as well as international and regional frameworks on the subject. The Commission had acted prudently in referring draft article 21 to the Drafting Committee for further consideration. Draft article 21 as proposed by the Special Rapporteur might not have been adequate to resolve the important question regarding the relationship between general rules of customary international law on diplomatic protection and the special law pertaining to bilateral and other investment treaties. The proposed article would totally deprive a party of the possibilities of invoking the right of diplomatic protection; that issue required further careful analysis. For instance, even if two countries had agreed to settle a dispute over investment in accordance with their bilateral agreement, if the dispute settlement process upon which they had agreed did not assure a fair and effective solution of the problem, there would be good reason for either party to seek an additional avenue in law to settle the matter. The bilateral agreement between the two parties might be interpreted as denying either party such an additional avenue and, for that reason, the issue must be considered on a case-by-case basis. The issue of *lex specialis* could be better resolved by placing the relevant provisions at the end of the draft articles,

rather than confining its scope to disputes related to foreign investment and legal persons.

83. With regard to the State of nationality of an enterprise, it was not appropriate to use the criterion of genuine or effective links. In the era of globalization when numerous multinational enterprises were operating in many countries while accepting investments from around the world, it might be difficult to determine which country had a genuine link. There was some risk that those countries might be left without diplomatic protection if a genuine link to a particular country could not be found; accordingly, the course of action taken by the Commission was, in his delegation's view, the correct one.

84. With regard to the diplomatic protection of legal persons other than corporations, the idea expressed by the Special Rapporteur in article 22 — of applying the principles expounded in regard to corporations mutatis mutandis to other types of legal persons — seemed to be acceptable. Since it would be difficult to cover all the various legal entities in one article, he said that it would be more practical to draft an article that would permit a certain degree of flexibility in its application rather than to attempt to categorize the variety of legal persons stipulated in the domestic laws of many countries.

85. With regard to the protection of crews by the flag State, in the M/V Saiga case, the International Tribunal for the Law of the Sea had ruled that the flag State represented claims for the vessel, crew and shipments and that such claims were based not on the right of diplomatic protection but on the basic principle of flag of nationality. In view of that judgement, the question raised in chapter III of the Commission's report on "the diplomatic protection of members of a ship's crew by the flag State" might be misleading and he proposed that it would be more appropriate to describe the issue simply as "the protection of members of a ship's crew by the flag State". At the same time it should be noted that there had been some cases in the past of concurrent or mixed claims being made based both on the exclusive jurisdiction of the flag State and on diplomatic protection. In cases in which an aircraft had been shot down there had been instances in which the registered State of the aircraft as well as the States of nationality of crew members and of passengers had simultaneously filed claims against the country which had caused the incident.

86. With regard to diplomatic protection of nationals employed by international organizations, the advisory opinion of the International Court of Justice concerning reparation for injuries suffered in the service of the United Nations acknowledged the status of the United Nations as a legal person and recognized the functional protection of the United Nations to file a claim for the damage sustained by its employees. It did not, however, specify the criteria for, or means of, adjustment between the functional protection exercised by the United Nations and the diplomatic protection that could be exercised by the State of nationality of the injured person. On that point, it could be said that when the rights of the injured person could not be remedied by the functional protection of the United Nations, there might be some room for the State of nationality to exercise its right of diplomatic protection for the injured person.

87. **Mr. Troncoso** (Chile), referring to the diplomatic protection of legal persons, said that in the *Barcelona Traction* case, the International Court of Justice had expounded as a general rule that, when a corporation suffered an injury, the State under the laws of which that corporation was incorporated and in whose territory it had its registered office had the right to exercise diplomatic protection. That decision, in respect of which the judges had expressed a number of dissenting opinions, had been criticized, in particular because it had not recognized the need for a genuine link between the State exercising protection and the legal person whose interests had been injured, a need that had been previously affirmed in a number of treaties providing for the direct protection of shareholders but which the Court had regarded as *lex specialis* in the *Barcelona Traction* case. The Rapporteur had stated that it fell to the International Law Commission to decide whether or not to follow the Court's decision in *Barcelona Traction*, particularly since, in the *ELSI* case, one of its Chambers had, to a certain extent, bypassed that decision by acknowledging the need for a genuine link of nationality between the shareholders. In those circumstances, it seemed possible to assert that, in addition to the State of incorporation, the State with which the company had a genuine link, whether that link derived from the nationality of the shareholders, economic control or the *siège social*, might exercise diplomatic protection, given that in the absence of that link, there would have been little point in incorporating the company in that country. In that case, States would

refuse to exercise protection and the rule could not be applied in practice.

88. With regard to the articles proposed by the Rapporteur, his delegation endorsed the wording of article 17, which laid the foundations for the protection of legal persons by the State or, in other words, the right to exercise protection in respect of the company holding its nationality. Likewise, the Chilean delegation agreed with the proposal for article 18, pursuant to which the State of nationality of the shareholders was entitled to exercise diplomatic protection when the corporation had ceased to exist in the place of its incorporation or when that corporation had the nationality of the State responsible for causing injury to the corporation. The report of the Special Rapporteur provided sufficient arguments in favour of the exercise of that right by the State of nationality of the shareholders.

89. With regard to the proposal for article 21, which addressed *lex specialis*, the Chilean delegation believed that, for reasons of legal certainty, it was appropriate to include a provision clarifying the relationship between the articles at issue and the rules laid down in international treaties on the settlement of disputes between investors (companies) and States. That provision must also appear in the specific chapter on legal persons and not in the general rules on diplomatic protection, since that particular aspect of disputes relating to legal persons had been given special treatment. Lastly, turning to the rule for the protection of legal persons proposed in article 22, he agreed with the Rapporteur that the other legal persons mentioned might also require diplomatic protection. Indeed, bearing in mind that the vast majority of the agreements concluded by States in the area of investments provided for a special system for the settlement of disputes, such other legal persons might, in the future, constitute the main subject of diplomatic protection. Chilean law recognized many non-corporate legal persons which might require such protection, in particular non-profit organizations, and for that reason, he agreed with broadening the scope of the rule. Nevertheless, the Commission should consider more carefully the possibility that certain persons, such as non-governmental organizations, which often had an international membership and hence no greater links with the State in which they were incorporated or in whose territory they had their *siège social*, might have recourse to that law.

90. With regard to the diplomatic protection of ships' crews, his delegation maintained its view that the Commission should address the issue by studying the differences between the provisions of article 292 of the United Nations Convention on the Law of the Sea and the exercise of diplomatic protection that the Commission was attempting to rule upon, and the unique features that such protection might present with regard to ships' crews.

The meeting rose at 1 p.m.

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Chairman: Mr. Baja ..... (Philippines)

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Agenda item 152: Report of the International Law Commission (*continued*)

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The meeting was called to order at 3 p.m.

Agenda item 152: Report of the International Law Commission (*continued*) (A/58/10)

1. **Mr. Grexa** (Slovakia), said that he welcomed the Commission's adoption of draft articles 8, 9 and 10 on diplomatic protection, particularly as the topic had been on the Commission's agenda since 1996. The draft articles gave the State where a violation of international law occurred the opportunity to redress that violation by its own means; he agreed that as local remedies varied from State to State, it would be unreasonable to establish an absolute rule governing their exhaustion.

2. It was true that foreign investment and the involvement of corporations in foreign trade might provide an occasion for the exercise of diplomatic protection. However, given the absence of State practice in that area, a separate set of articles on that issue was unnecessary; article 22 would appear to be sufficient.

3. While bilateral investment treaties were crucial to the establishment of a sound environment capable of attracting foreign direct investment, the draft articles provided necessary general rules for the protection of foreign corporations. He understood the rationale for article 21 (*lex specialis*) but agreed that it should be formulated in more general language, possibly as a "without prejudice" clause.

4. He reiterated his delegation's position that the Commission should base its work on the diplomatic protection of shareholders on the views expressed by the International Court of Justice in the Barcelona Traction case; once revised, draft article 18 might adequately define the threshold for a State's intervention on behalf of its shareholders.

5. His delegation remained unconvinced that the flag State of a vessel should have the right to exercise diplomatic protection in respect of crew members who were nationals of a third State; the matter was sufficiently covered by the Convention on the Law of the Sea. The Commission should proceed with caution when entering into an exercise which might have an impact on other areas of international law.

6. Lastly, he commended the Special Rapporteur's intention to submit his final report on the topic in 2004 so that the draft articles could be finalized in the near future.

7. **Ms. Bole** (Slovenia) said that she supported the proposal of the Austrian and Swedish delegations aimed at revitalizing the Committee's debate, thus making it more effective.

8. She welcomed the Special Rapporteur's plan to submit his final report on diplomatic protection during the coming year. Furthermore, as her delegation had stated in the past, Slovenia considered that flag States should not have the right to exercise diplomatic protection on behalf of the crew members of ships, irrespective of their nationality. Any reference to the decision in *The M/V "Saiga"* case should mention only the Convention on the Law of the Sea, on which it was based and which could not be said to have enlarged the scope of diplomatic protection.

9. Her delegation was also opposed to granting international organizations the right to exercise functional protection on behalf of their officials. The advisory opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations* should be considered only as an exception to the nationality principle; the Commission's work should be based on a customary law approach, although it should remain open to new developments in that field.

10. The State of nationality of shareholders should not have the right to exercise diplomatic protection on their behalf; she was pleased that draft articles 17 to 22 granted such a right only in exceptional cases, and she appreciated the Commission's effort to balance existing jurisprudence with the progressive development of international law. As stated in paragraph 86 of the report, any lifting of the "corporate veil" would create difficulties not merely for courts, but also for States of investment.

11. **Mr. Hafrad** (Algeria) said he did not believe that the question of functional protection by international organizations of their officials should be covered by the draft articles because it constituted an exception to the principle of the link of nationality, which was the basis for diplomatic protection. However, the Commission should clarify the issue of competing claims made by the State of nationality and the organization concerned with regard to personal injuries to the latter's officials, which the International Court of Justice had considered in its 1949 advisory opinion on

Reparation for Injuries Suffered in the Service of the United Nations.

12. The question of whether the flag State of a vessel should have the right to exercise diplomatic protection in respect of crew members who were nationals of a third State was adequately regulated by existing legal instruments, including the Convention on the Law of the Sea. Thus, while those instruments did in some cases confer on flag States the right to exercise prerogatives similar to diplomatic protection, that protection was in fact governed by a different legal regime (*lex specialis*), as seen from *The M/V "Saiga"* case; moreover, expansion of States' right to intervene under such conditions might weaken the principle of nationality which was the basis for diplomatic protection.

13. **Mr. Kuzmenkov** (Russian Federation) said that the Commission seemed to have made good progress with the topic of diplomatic protection, to which his delegation attached great importance. He wished, however, to draw attention to a number of points that emerged from the draft articles adopted at the fifty-fifth session. First, he expressed support for the Commission's decision to endorse the conclusions reached by the International Court of Justice in the *Barcelona Traction* case concerning the definition of the nationality of a corporation according to its place of incorporation and the definition of the State that was entitled to exercise diplomatic protection as being primarily that corporation's State of nationality. That judgment, despite the criticism directed at it, had made it possible to avoid situations in which several States had the right to exercise diplomatic protection. The judgment made for greater stability in relations between States and investors. Diplomatic protection for natural persons in cases where several States were entitled to exercise diplomatic protection on behalf of persons with dual or multiple nationality was not comparable, since investors' rights to protection were based not on the law on diplomatic protection but on bilateral and multilateral investment treaties. In that connection, the Commission should reconsider the exclusions to the right to exercise diplomatic protection on behalf of the shareholders in a corporation, set out in draft article 18: it might well be possible to make the exceptions less restrictive. For example, draft article 18 (a) could indicate that the right of a State of nationality of shareholders to exercise diplomatic protection arose only when the corporation concerned had ceased to exist as a result of an internationally wrongful act by the State of nationality of the corporation or, in the case described in draft article 18 (b), if the corporation that had ceased to exist had been obliged to be incorporated in that State's territory under its law.

14. The Commission should take particular care in its consideration of draft articles 21 and 22. The former, relating to *lex specialis*, should not be drafted in such a way as to oblige a person to choose between human rights protection mechanisms and diplomatic protection. As for draft article 22, the current text, rather than clarifying the question of protection for legal persons other than corporations, introduced greater uncertainty. It might be preferable to exclude the issue from the scope of the draft articles but include a "without prejudice" proviso.

15. Further thought should also be given to the definition of the word "corporation", namely the legal persons which would be able to claim diplomatic protection from a State under the provisions drafted by the Commission. Not all legal systems defined the term "corporation". The Special Rapporteur had indicated that corporations were legal persons engaged in commerce, but it emerged from later draft articles that the term was applied only to corporations with shareholders. He wondered, therefore, whether it was only in respect of the latter that a State could exercise diplomatic protection.

16. As for the question of what other aspect of the topic should be studied, his delegation considered that the Commission should restrict itself to the issues that had already been identified.

17. **Ms. Dascalopoulou-Livada** (Greece), speaking on the articles on diplomatic protection that the International Law Commission had referred to the Drafting Committee, said that draft article 17 enunciated the basic rule, solidly based on the judgment of the International Court of Justice in the *Barcelona Traction* case, that the State entitled to exercise diplomatic protection with regard to corporations was the State of nationality of the corporation. The proposed article then offered a variety of options for defining the notion of the nationality of a corporation. Although her delegation would have opted for the State of the domicile or *siège social* of the company, as embodied in the civil law system of Greece and many other countries, for the sake of

consensus it was prepared to accept the use of the place of incorporation and registered office as the decisive link for the purposes of diplomatic protection. Taking language from the *Barcelona Traction* judgment, the article might include the following wording: "For the purposes of diplomatic protection, the State of nationality of a corporation is the State under whose laws it is incorporated and in whose territory it has its registered office". The mention of other links beyond those with the State of incorporation, registered office or domicile of the company would detract from the clarity of the provision.

18. Draft article 18 as proposed did not reflect customary international law and directly contradicted the rule stated in draft article 17 by introducing too broad an exception, with the effect that in too many cases the "corporate veil" would be lifted to enable the State of nationality of the shareholders to exercise diplomatic protection in their favour against the State of nationality of the corporation. The *Elettronica Sicula S.p.A. (ELSI)* case was not relevant, since it concerned the interpretation of a bilateral agreement between the United States of America and Italy, and therefore did not justify a drastic departure from the *Barcelona Traction* rule.

19. Draft articles 19 and 20 expressed established rules. However, draft article 21 introduced another exception allowing for the application of "special rules of international law". It remained unclear whether rules relevant to the international protection of human rights would be covered. One solution might be to include a provision stating that diplomatic protection was subsidiary to special regimes for the protection of investments or of human rights, provided the protection afforded under a special regime was guaranteed by a binding decision, such as a judicial decision or an arbitral award. If the protection thus afforded was not satisfactory, diplomatic protection could come into play. In any case, a provision of that kind, expressly covering both natural and legal persons, should be placed in the final clauses of the draft articles.

20. The wording of draft article 22 would cover non-governmental organizations, since they were usually vested with legal personality under domestic law, but might not cover other associations of persons. In all cases not involving corporations, however, the Commission was entering uncharted territory and should proceed with caution.

21. With regard to the draft articles provisionally adopted by the Commission, it was not clear whether draft article 8, paragraph 2, would cover resort to an ombudsman. In draft article 10, the threshold above which local remedies would be presumed exhausted was too low. The phrase in subparagraph (a), "no reasonable possibility of effective redress", was wider than appropriate and should be replaced by something along the lines of "obvious futility". The waiver referred to in subparagraph (d) should be express; to allow for a tacit waiver was a dangerous course to follow. In general, the work on diplomatic protection was well advanced and her delegation expected it to be concluded within the current quinquennium.

22. Her delegation vigorously supported the work on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities, believing that, following the elaboration of the draft articles on prevention, it was logical to proceed to the question of liability in relation to the same activities. Although it was no easy matter, ideally both prevention and liability should be dealt with in a normative manner, by way of a convention.

23. There were a number of theoretical options that could be adopted as the basis for liability of the State. The State could be held liable solely if it was found deficient in its duty to exercise due diligence in controlling sources of harm in its territory. However, such a solution would not deviate from the well-known path of State responsibility for wrongful acts and would add little to the law already in force. It would be of no real use to individual victims, who would bear the burden of proof of lack of due diligence on the part of the State and lacked access to international courts. Another option would be to establish an obligation under international law for the State in whose territory the hazardous activity was being conducted to compensate for any transboundary harm the activity caused, in other words, to give the State full primary liability. Such a solution would be unfair to States, since the activity chiefly profited the operator, and could not be seriously considered. The Working Group established by the Commission in 1996 had indicated that the two possible courses of action were resort to the courts of the State where the harm originated or negotiations between the States concerned. Neither course offered anything to the victim from the standpoint of international law. Her delegation believed that the best option was to supplement the civil liability

of the operator with the residual liability of the State. Such a regime of strict liability of a residual character would be without prejudice to the responsibility of the State for any wrongful act committed by it.

24. Most of the recommendations of the Working Group established in 2002 were acceptable to her delegation, which was in favour of retaining the threshold of "significant harm" and covering under the definition of "harm" any loss to persons and property, including elements of State patrimony and natural heritage as well as environment within the national jurisdiction. With regard to damage to the environment, and on other points as well, it would be advisable to take into account the provisions of the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters recently adopted in Kyiv under the auspices of the Economic Commission for Europe. Loss of profits should not be altogether excluded from the possibility of compensation. The Kyiv Protocol offered a balanced solution by limiting such compensation to "legally protected" interests.

25. **Mr. Braguglia** (Italy), referring to the topic of diplomatic protection, said that the draft articles relating to the exhaustion of local remedies seemed satisfactory, although it would have been preferable if the requirement that local remedies should be adequate had been made part of the rule rather than expressed in the form of an exception. To state as a principle that local remedies need not be exhausted where they provided no reasonable possibility of effective redress was to state the obvious.

26. Paragraphs 102 to 104 of the Commission's report gave rise to some concern. A majority of the Commission seemed to have spoken in favour of draft article 18 (b), which allowed the State of nationality of shareholders to exercise diplomatic protection on their behalf in cases where the corporation concerned had the nationality of the State responsible for causing injury to the corporation. That, however, constituted a glaring exception to the rule given in draft article 17, according to which only the State of nationality of the corporation could exercise protection. That was the solution adopted by the International Court of Justice in the *Barcelona Traction* case and supported by almost all delegations to the Sixth Committee in 2002. In any case, the exception would cause considerable practical difficulties, owing to the difficulty of knowing who the shareholders of a corporation were.

27. His delegation welcomed the Special Rapporteur's intention to deal in his next report with the diplomatic protection of members of a ship's crew, which would give timely guidance on an important practical issue that was not explicitly covered by the United Nations Convention on the Law of the Sea, and of employees of international organizations. In addition, it would be useful for the Commission to consider the extent to which the draft articles applied to human rights violations, since the State of which an individual was a national did not necessarily play the same role as it did in relation to a breach of obligations concerning the treatment of foreigners.

28. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, he commended the way in which the Special Rapporteur and the Commission had approached the topic. The Commission should, however, decide whether its aim should be to formulate a series of recommendations to States or rather to tackle the task of developing a general model treaty that could be applied in the absence of any specific treaty regime. If it decided on the latter option, it would find it difficult to move beyond a preliminary text that would do no more than ease negotiations by representatives of States. There were, however, numerous interests at stake and the financial implications of any statement of liability for injurious consequences arising out of acts not prohibited by international law were considerable. In particular, an effective insurance system would require wide participation by potentially interested States.

29. **Ms. Loffler** (Australia) said that she supported the Special Rapporteur's approach to the subject of the diplomatic protection of corporations and shareholders and noted that draft articles 17 to 19 endorsed the primary rule expounded by the International Court of Justice in the *Barcelona Traction* case, with certain exceptions which reflected the realities of foreign investment. She also supported the proposal to exclude from the scope of the draft articles the question of a flag State's right to bring a claim on behalf of a ship's crew or passengers.

30. Australia welcomed the Commission's resumption of work on the issue of international liability following its consideration of the prevention of transboundary harm from hazardous activities and commended the Special Rapporteur for his first report on the legal regime for the allocation of loss in case of

transboundary harm arising from hazardous activities (A/CN.4/531). On the issue of the appropriate relationship between the State and operators, while the specific procedural and substantive requirements which States imposed on operators would vary from industry to industry, they should focus on contingency plans for responding to incidents that carried a risk of transboundary harm. The State should ensure that operators were in a position to take prompt, effective action in order to minimize harm and were required to maintain appropriate insurance for that purpose. The definition and categories of compensable damage or harm to property and the environment should not be unduly limited, particularly where the property or environment fell within the jurisdiction or control of a State and where the damage or harm resulted in direct loss to the proprietary or possessory interests of individuals or the State.

31. Her delegation would reserve its judgement on the final form of work on the topic until the substance of the draft articles on liability had been determined. However, since international liability did not lend itself easily to codification and progressive development, and noting the diversity of civil liability regimes, the draft articles would be most useful if they took the form of general rules supplementing the law of State responsibility, the laws and practices of existing systems of liability and the remedies available under domestic and private international law. While it might be difficult to articulate general principles of liability in that area, the guiding principle should be that innocent victims should not bear the loss on their own and that primary responsibility for compensation should rest with those in command or control of the activity at the time of the incident. Where the operator did not have the financial resources to provide adequate compensation, the State should provide supplemental funds on the basis that it had authorized the activity and insofar as it had benefited therefrom.

32. **Mr. Henczel** (Poland) said that the annual Sixth Committee debate on the report of the International Law Commission could be made more effective by modifying the way in which the report was presented to the Committee and by restructuring the ensuing discussion. The presentation of the report should be shortened. Although the chapter-by-chapter format could be retained, the presentation should concentrate on the most important achievements and developments of the Commission session and underline the problems on which the views of Committee members would be most desirable. Discussion in the Committee should focus on the specific issues identified in the report on which comments would be of particular interest to the Commission. However, Member States should not wait for the debate in the Sixth Committee but should give the Commission written comments. A more focused discussion would make it possible to shorten the debate, leaving room for side events on international law.

33. On the topic of diplomatic protection, the provisional adoption by the Commission of draft articles 8 to 10 concerning exhaustion of local remedies and the commentaries thereto was a significant achievement. Draft articles 17 to 22, which had been referred to the Drafting Committee, dealt chiefly with the diplomatic protection of corporations and still presented some problems in terms of practical application. The definition of the State of nationality of a corporation in draft article 17 as it had emerged from the Working Group contained too many possible alternatives to be helpful. There was still no agreement on the connection between a corporation and its State of nationality that would create an acceptable basis for diplomatic protection.

34. Draft article 18, while rejecting as a general rule diplomatic protection by the State of nationality of the shareholders in the case of an injury to the corporation, nonetheless set forth reasonable and practicable exceptions in situations where the shareholders might otherwise be left without any State protection of their legitimate interests. Mechanisms provided by bilateral or multilateral agreements on the protection of foreign investments might not always be sufficient to fill the gap. Draft article 19 was a saving clause to protect shareholders whose own rights, as opposed to those of the company, had been injured. Since those independent rights had been recognized in the *Barcelona Traction* judgment, the provision was best kept in a separate article. While the *lex specialis* provision in draft article 21 was not strictly necessary, its inclusion would do no harm. However, it might be useful to reformulate it as a more general provision applicable to the draft articles as a whole.

35. Although it recognized that that there was little State practice on the diplomatic protection of legal persons other than corporations, his delegation nevertheless felt that the issue should be addressed and therefore favoured retaining the provision in draft

article 22. His delegation shared the view of the Special Rapporteur that it was not possible to draft further articles dealing with the diplomatic protection of every kind of legal person, given the great variety of forms that legal persons might take, depending on the internal legislation of a given State. Unilateral extension of legal personality to a wide variety of entities by individual States could create problems in exercising diplomatic protection on behalf of such entities vis-à-vis other States. Even the broad mutatis mutandis formula in draft article 22 would not solve the problem. It might be useful to include in the text of the article a requirement of mutual recognition of the legal personality of a given entity by the States concerned.

36. The topic of a legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities was logically being treated as a continuation of the draft articles on prevention. The Special Rapporteur's submissions for consideration by the Commission served as a useful list of the problems and questions to be analysed and solved. His delegation basically agreed with all the Special Rapporteur's suggestions, subject to some further clarifications. For instance, it was not perfectly clear what criteria should be applied in the "test of reasonableness" in determining the liability of the person in command and control of the hazardous activity. The key suggestion, with which his delegation fully agreed, was to continue the approach adopted in the draft articles on prevention, not only for reasons of formal compatibility, but also because of an objective need for uniformity. For example, it would be desirable to apply the same threshold of "significant harm" as in the draft articles on prevention. Instead of "allocation of loss" or "loss", it might be better to revert to more familiar terms such as "damage" and "compensation".

37. With regard to the debate on the viability of the topic, his delegation viewed it as a logical follow-up to the draft articles on prevention and the issue of State responsibility. It filled a gap in addressing situations where, despite the fulfilment of the duties of prevention to minimize risk, significant harm was caused by hazardous activities. In terms of its scope, his delegation regretted that the issue of the "global commons" had been left out to make the topic more manageable. The environmental unity of the planet was not affected by political borders, and it was an area worth and requiring further study. Although the question of the final form of the work on liability needed to be analysed in depth, it was too early to decide that it was not appropriate for codification and progressive development. Even if that should finally be concluded, it would still be useful to elaborate a set of recommendations or guidelines to help States in their practice. The Commission should continue to work on its model of allocation of loss, which should be general and residuary in character and leave States sufficient flexibility to develop schemes of liability to suit their particular needs.

38. **Mr. Baker** (Israel), referring to the topic of diplomatic protection, observed that the common feature linking the question of flag State responsibility and functional protection by international organizations of their officials was that the nationals concerned found themselves temporarily within a distinct legal framework governed by a specific regime. For example, a distinction must be made between the function of the flag State while the ship was at sea and the responsibility of the State of nationality of each crew member. Similar issues arose with respect to the exercise of functional protection by international organizations, as discussed — though not fully resolved — by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*. His delegation continued to endorse the generally held position, which seemed to have gained ground in the Commission, that the scope of the draft articles on diplomatic protection should be confined essentially to the traditional boundaries of nationality of claims and exhaustion of local remedies and to customary international law, under which the State had full discretion in the exercise of diplomatic protection.

39. Turning to the issue of international liability and the question of the procedural and substantive requirements that the State should place on an operator, he said that it would be preferable not to set specific requirements, but rather to establish that States' legislation must include rules governing operators' liability and obligation to compensate; however, consideration should be given to setting a minimum threshold for that obligation.

40. In principle, he would prefer the issue of the basis and limits of allocation of loss to the operator to be settled by domestic legal systems; he doubted that international law should intervene in apportioning such losses. Where the State was not the actual operator, its

commitment could be fulfilled by establishing reasonable procedural and substantive requirements for operators. Consideration should also be given to whether the operator was a national of the State, whether it conducted its activities from the territory of the State and whether the harm caused by the operator occurred in the State.

41. The problem of losses that were not covered by the operator or other sources of supplementary funding could be addressed by requiring operators to carry insurance; it might be preferable for such a requirement to be set by the operator's State of nationality in order to ensure effective enforcement and to prevent any abuse of developing States. As to the nature and extent of State funding in respect of such losses, his delegation was of the view that, where the State itself was the operator or was directly and effectively related to the harmful operation, it should be treated as a private actor in relation to the allocation of loss; in other circumstances, States should be obliged to do their utmost to enact legislation designed to prevent uncovered losses and to exercise due diligence in ensuring the effective enforcement thereof.

42. Because damage to the environment per se could affect all humankind, including future generations, the principle of sustainability should prevail. However, the issue might be better addressed in a separate, environmentally oriented framework rather than by the Commission.

43. As to the final form of the work on the topic, he thought that guidelines or model rules, taking into account the current stage of development of the field, would be preferable to a specific multilateral convention.

44. On the issue of unilateral acts of States, he reiterated his delegation's concern that any attempt to establish a single set of rules for the wide range of unilateral acts was problematic; the question was whether the unique problems relating to specific unilateral acts deserved further consideration by the Commission. In the absence of a systematic analysis of existing State practice in that area it would be difficult, if not premature, to proceed until a wider response from States had been received. Any study of the application of unilateral acts of recognition should be strictly limited to that topic and should not include other complex, controversial issues such as the legal requirements for recognition of a political entity as a State.

45. Turning to the topic of reservations to treaties, he said that the definition of the term "objection" proposed by the Special Rapporteur in draft guideline 2.6.1 did not take into account the fact that the formulation of an objection was not necessarily intended solely to prevent the application of the provisions of the treaty to which the reservation related between the author of the reservation and the State or organization which formulated the objection or to prevent the treaty from entering into force in the relations between them. The State or organization might also object to a reservation on the grounds that it was impermissible because it was prohibited by the treaty or was incompatible with the object and purpose thereof, as provided by article 19, paragraphs (a) and (c), of the Vienna Convention on the Law of Treaties. In such cases, the objection related to the right of the reserving State to make the reservation.

46. While it would be useful for the grounds for objections to reservations to be stated clearly in order to avoid misinterpretation and to allow the reserving State to review the issue in question in its treaty relationship with the objecting State or organization, he saw no need to make such a practice obligatory.

47. Lastly, with respect to draft guideline 2.3.5, he was concerned at the potential problems inherent in enlarging the scope of a reservation at a later date and at the question of compatibility with the logic of traditional international treaty law; at most, such enlargement should be viewed as a late formulation of the reservation and should be treated as such.

48. **Mr. Čižek** (Czech Republic), after noting that the progress made on the topic of diplomatic protection gave rise to hope that the work could be concluded within the current quinquennium, said that his delegation was not convinced of the need to extend the scope of the draft articles either to the protection of a ship's crew and passengers who were nationals of a State other than the flag State or to the so-called functional protection exercised by an international organization on behalf of its officials. On the other hand, the Commission could, perhaps, consider the issue of the delegation to a third State of a State's right to exercise diplomatic protection. Although the Special Rapporteur had noted that the question did not arise frequently in practice and was seldom discussed by the

jurisprudence, article 20 of the Consolidated Version of the Treaty establishing the European Community stated that every citizen of the Union was, in the territory of a third country, entitled to protection on the same conditions as the nationals of that State. The issue therefore was, or could be, a practical one, at least for member States of the European Union.

49. In that context, he noted how delicate and contradictory the issue of the diplomatic protection of shareholders had been at the time when the International Court of Justice had rendered its judgment in the *Barcelona Traction* case, and perhaps still was: there had been criticism not only of the general rule the Court had expounded but also the way in which it had arrived at that rule. His delegation, however, did not favour any modifications to the rule which — together with the exceptions recognized in the judgment — accurately reflected the current state of customary international law in relation to the diplomatic protection of corporations. To depart from the rule by allowing the possibility of two or even more competing claims on behalf of a corporation or its shareholders could, as the Court had pointed out, create an atmosphere of confusion and insecurity in international economic relations. It was therefore gratifying that the Special Rapporteur, supported by most of the Commission, had favoured the same approach. The statement of principle in draft article 17, paragraph 1, was thus appropriate. As for paragraph 2, his delegation would favour the deletion of the text currently in square brackets.

50. With regard to draft article 18, which prompted the question whether the de jure or the de facto status of a corporation should be decisive in formulating the exception from the general rule, his delegation shared the Court's opinion in the *Barcelona Traction* case that the company's status in law was alone relevant and not its economic condition or the possibility of its being practically defunct. His delegation therefore supported the basic idea of draft article 18 (a). It would, however, be hesitant about stating that draft article 18 (b) reflected the current status of customary international law. Even the Court had not explicitly taken a stand on the question whether or not there was an exception to the general rule that would enable a State of nationality of shareholders to exercise diplomatic protection on behalf of those shareholders in situations in which the State of nationality of the corporation was responsible for the alleged injury to the corporation: indeed, the Court had been divided on the issue. His delegation noted with interest, however, the opinion of the Special Rapporteur and of many scholars and several States that the Court's reference to "equity" in relation to the exception to the rule might be considered to be an implicit recognition of that exception by the Court. Moreover, the exception had been recognized in several arbitral decisions.

51. Lastly, referring to paragraphs 440 to 443 of the report, he said that, since its first annual session in 1949, the Commission had, in accordance with article 1 of its Statute, dealt with many topics of international law and with special assignments from the General Assembly, examining particular legal questions. In most cases, its final report on a given topic contained a set of draft articles accompanied by extensive commentaries, which had frequently served as the legal basis for the elaboration of international conventions. The Commission's role in the process of the codification and progressive development of international law was of incalculable importance. His delegation therefore fully endorsed the Commission's conclusion, contained in paragraph 443, that the new regulations on page limits for reports of subsidiary bodies, contained in the Secretary-General's report "Improving the performance of the Department of General Assembly Affairs and Conference Services" (A/57/289), should not apply to the documentation of the Commission.

The meeting rose at 4.40 p.m.